IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.466 OF 2004

IN

SUIT NO.3548 OF 1997

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Mr.Sevantilal M. Shah ...Plaintiff

v/s.

Mr.R.N.P.Sinha ...Defendant

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Mr.P.G. Lad for the Plaintiff.

Mr.R.R. Sharma for Defendant.

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CORAM: D.K.DESHMUKH, J.

DATED: 10TH DECEMBER,2004

P.C.:

1. This Notice of Motion has been taken out by the original Defendant. The summary suit was filed by

the Plaintiff. The Plaintiff after serving the writ of summons on the Defendant, took out summons for judgment No.96 of 1998. That summons for judgment was decided by the Court by order dated 6-11-2003. Perusal of the order shows that the advocate of the Defendant was absent. The advocate for the Plaintiff was present. The order further shows that the defence raised by the Defendant has been considered by the Court and has been rejected by the Court. In the Notice of Motion the case of the Defendant is that neither the Defendant nor his lawyer were present, because, on the relevant date the clerk of his advocate Shri R.R.Sharma, by name Mr.D.N.Singh did not notice the matter on board. It is pertinent to note that affidavit of the clerk who is blamed for not noticing the matter on board has not been filed. It appears that after service of writ of summons on the Defendant, Mr.B.G.Wadhawa, Advocate was engaged as an advocate and he filed his vakalatnama. Before 6-11-2003 the Defendant took back all his papers from Mr.Wadhawa, Advocate and entrusted them to another advocate. Though that advocate filed a sur-rejoinder on behalf of the Defendant, he did not file his appearance, still his name was shown on board along with Mr.Wadhawa. Thus, for non-appearance of the

Defendant and the advocate, the clerk of the new advocate who had not filed his power has been blamed either without joining that clerk as a party, so that the court might have given him an opportunity to hear or without filing an affidavit of that clerk owning his mistake. In the absence of affidavit of that clerk or in the absence of he being before the Court, in my opinion, the Court will not be able to record the finding that the clerk committed a mistake. Recording of such finding would be contrary to the principle of natural justice.

2. Taking overall view of the matter, therefore, I had put it to the learned Counsel appearing for the Defendant that the Defendant should deposit 50% of the amount of principal in Court so that he could be given an opportunity of being heard on the summons for judgment. But the Defendant flatly declined to make any deposit. In my opinion, setting aside of the decree, in these circumstances, would be unjust, specially because the Court has taken into consideration the defence raised by the Defendant in his reply filed in the summons for judgment. Notice of Motion disposed of.

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